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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 704

THE UNITED STATES, PETITIONER

vs.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1932

CERTIORARI GRANTED MARCH 21, 1932

(36518)

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1 In Supreme Court of the United States

October term, 1931

No. 704

THE UNITED STATES, PETITIONER

v.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND Howard Sutherland, Alien Property Custodian

Petition for a writ of certiorari to the Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case of January 27, 1932. The opinion of the court below is reported in 52 F. (2d) 1030. The jurisdiction of this court is invoked under section 3 (b) of the act of February 13, 1925.

STATUTES INVOLVED

Section 203 of the revenue act of 1916 (c. 463, 39 Stat. 756, 778) provides in part:

"SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate * * * and such other
2 charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered; * * *."

Section 1113 of the revenue act of 1926 (c. 27, 44 Stat. 9, 116) provides in part:

"SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"'SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.'"

Section 1316 of the revenue act of 1921 (c. 136, 42 Stat. 227, 314) provides:

"SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:

"'SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum.'

"This section, except as modified by section 252, shall apply retroactively to claims for refund under the revenue act of 1916, the revenue act of 1917, and the revenue act of 1918."

This provision was reenacted without change so far as is here important by section 1012 of the revenue act of 1924 (c. 234, 43 Stat. 253, 342) and by section 1112 of the revenue act of 1926 (c. 27, 44 Stat. 9, 115).

STATEMENT

This suit was originally brought in the Court of Claims by the residuary legatees of the estate of Rosa von Zimmermann, a German alien, who died testate at her residence in Pasadena, Cali-
3 fornia, on April 25, 1917, to recover an alleged overpayment of the Federal estate tax on the ground that the amount paid by way of inheritance tax to the State of California should have been allowed as a deduction from the gross estate. The executors of the estate, both of whom were citizens of the United States, acting under letters testamentary issued by the Superior Court of the State of California for the County of Los Angeles, filed a Federal estate-tax return under the Revenue Act of 1916, on April 19, 1918, and on the same day paid the amount of tax shown thereon. (Findings 1, 5.) On August 10, 1918, the Commissioner of Internal Revenue assessed an additional tax, which was paid on September 10, 1918. (Finding 6.) The California inheritance tax was paid by the executors on October 23, 1918. (Finding 7.) No deduction for this inheritance tax was made in the return filed or in the determination by the commissioner. (Finding 8.)

The residuary legatees, respondents herein, were residents and citizens of Germany. (Finding 3.) On June 12, 1918, the Alien Property Custodian, acting under the authority of the trading with the enemy act of October 6, 1917, and the Executive orders issued thereunder, notified the executors to convey, transfer, assign, deliver, and pay to him all the right, title, and interest of the residuary legatees in the estate. (Finding 4.) No further action was taken by the Alien Property Custodian until September 29, 1922, when he filed a petition in the proper State court requesting distribution of the estate. On October 26, 1922, the court ordered distribution, and the residue of the estate was delivered and paid over to the

Alien Property Custodian. (Finding 9.) On the same date
4 the executors, having rendered a final account, were discharged. (Finding 2.)

On December 27, 1923, the residuary legatees filed a claim for refund on the sole ground that certain assets of the gross estate had been overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim on the same ground. (Finding 10.)

On November 23, 1925, the Commissioner of Internal Revenue was advised by letter on behalf of the residuary legatees and the Alien Property Custodian that refund was also claimed on the ground that the sum paid to the State of California by way of inheritance tax should have been allowed as a deduction from the gross estate for the purposes of the Federal estate tax. On January 7, 1926, more than seven years after the Federal estate tax was paid, the Alien Property Custodian filed a formal claim for refund on the same ground. (Finding 10.) This claim was rejected by the commissioner on July 11, 1928, for the stated reason that under the laws of California the State inheritance tax is not a charge against the estate within the meaning of section 203 of the revenue act of 1916. (Finding 11.)

Suit was instituted by the residuary legatees on December 18, 1928. The Court of Claims held on November 2, 1931, that the claim for refund filed by the Alien Property Custodian on January 7, 1926, was timely, and that the residuary legatees were entitled to recover the sum of $23,563.03, which it ordered to be paid with interest to the Alien Property Custodian "to be administered according to law." On January 26, 1932, respondents filed a motion for leave to file an amended petition joining the Alien Property Custodian as a party plaintiff. On January 27, 1932, the Court of Claims allowed the motion, entered an order vacating its former judgment, and rendered judgment in favor of respondents.

5 QUESTIONS PRESENTED

1. Whether a claim for refund filed by the Alien Property Custodian on January 7, 1926, more than four years after final payment of the estate tax, was barred by the provisions of section 3228 of the Revised Statutes, as amended by section 1316 of the revenue act of 1921, and subsequent revenue acts.

2. Whether the amount paid to the State of California under the California inheritance tax act of 1913 was a lawful deduction from the gross estate under section 203 (a) (1) of the revenue act of 1916.

SPECIFICATION OF ERRORS

The Court of Claims erred—

1. In holding that the Alien Property Custodian acquired immediate possession of the residuary legatees' interest in the estate by virtue of the notice to the executors dated June 12, 1918, in spite of

the fact that he did not take physical possession of any part of the estate until 1922.

2. In holding that the enemy status of the residuary legatees prevented the executors from filing a claim for refund.

3. In holding that the refund claim filed by the Alien Property Custodian on January 7, 1926, was timely.

4. In holding that the inheritance tax paid to the State of California under the California inheritance tax act of 1913 was a charge upon the estate within the meaning of section 203 (a) (1) of the revenue act of 1916, which could be deducted from the value of the gross estate in determining the Federal estate tax.

5. In rendering judgment in favor of respondents.

REASONS FOR GRANTING THE WRIT

6 1. The Court of Claims erred in holding that the claim for refund filed by the Alien Property Custodian on January 7, 1926, was filed in time to permit the maintenance of this action.

In so holding the court proceeded upon three assumptions which, we submit, were erroneous: (a) That the Alien Property Custodian obtained constructive possession of the residuary legatees' interest in the estate in 1918; (b) that the enemy status of the residuary legatees prevented the executors from filing a refund claim; and (c) that the statute of limitations relating to tax refunds is not applicable to the Alien Property Custodian. We submit that the limitations contained in section 1316 of the revenue act of 1921 are applicable and that this suit was barred by failure to file a claim for refund based upon the payment of the California inheritance tax within four years after payment of the Federal estate tax.

The notice which the Alien Property Custodian served upon the executors in 1918 gave him no greater rights than the residuary legatees had, and did not entitle him to possession until the extent of their interest had been determined. (Kahn v. Garvan, 263 Fed. 909 (S. D. N. Y.); Miller v. Rouse, 276 Fed. 715 (S. D. N. Y.); Isenberg v. Trent Trust Company, 26 F. (2d), 609, 613 (C. C. A. 9th).) This was recognized by the Alien Property Custodian, who did not attempt to obtain possession from the executors but applied to the State Probate Court for distribution and acquired possession only under the decree of distribution. Before such distribution the executors continued in the management and settlement of the estate as a whole, and it was their duty to secure refund of any taxes overpaid by them. It seems clear that they alone would have been recognized by the Commissioner of Internal Revenue as the proper parties

7 to file a claim. (See Regulations 37 (1919 and 1921 eds.), arts. 106, 110.) The record shows that the executors had access to the courts for the purpose of probating the will, administering the estate, and settling their accounts. (See Riddell v. Fuhrman, 232 Mass. 69.) The successful prosecution of a claim for refund would

not have brought "aid and comfort" to the enemy. (Birge-Forbes Company v. Heye, 251 U. S. 317, 323; Sutherland v. Mayer, 271 U. S. 272, 287.) It follows that the executors might have filed a refund claim within the period during which they administered the estate. The statutory bar contained in section 1316 of the revenue act of 1921 had fallen when the decree of distribution was entered by the California court. We submit that failure of the executors to file a claim within the statutory period precludes recovery by the beneficiaries or any other party, including the Alien Property Custodian.

2. The Court of Claims held that the statute of limitations does not apply to the Alien Property Custodian, because he is an officer of the United States. We believe that, for the reasons previously stated, the filing of a claim for refund was barred before the custodian obtained possession of the property of the residuary legatees, so that the question of the applicability of limitations to him is quite irrelevant. But even if that question is involved, we submit that the decision of the Court of Claims on this question was erroneous and contrary to the settled practice of the Treasury Department. Section 24 of the trading with the enemy act, as amended by section 18 of the settlement of war claims act of March 10, 1928 (c. 167, 45 Stat. 254, 276), provides for the extension of the statutory period of limitations in certain specified cases. In the practice of the Treasury Department this has been construed as showing the intent of Congress that in all other cases the ordinary period of limitations is applicable, even though refund is sought by the Alien Property Custodian. (See G. C. M. 5000, VII–2 Cumulative Bulletin (July–Dec., 1928), 176.) We believe that this construction was correct and that, if the question can be considered in this case, the custodian, like the residuary legatees, was barred by failure to file claim for refund within the statutory period. We are informed that numerous claims for refund have been rejected on this ground and that there are now pending in the Bureau of Internal Revenue several cases involving this question.

3. If, for any reason, the suit was not barred because claim for refund was not filed in time and the suit can be determined on the merits, the decision of the Court of Claims regarding the deductibility from the gross estate of the California inheritance tax appears to disregard the construction placed upon the California statute by the courts of California, and in so far as it does so the decision is in conflict with the decision of this court in Keith v. Johnson (271 U. S. 1), in which this court held that the determination of the State courts as to the character of State transfer taxes is to be accepted by the Federal courts.

The California inheritance tax of 1913 (Cal. Stats. 1913, p. 1066), under which the tax in question was imposed, and earlier California statutes similar in form, have been uniformly construed by the

highest court of that State as succession taxes, levied upon the right of the beneficiary to take the property bequeathed or devised. (Kennedy's Estate, 157 Cal. 517; Estate of Hite, 159 Cal. 392; Estate of Miller, 184 Cal. 674; Estate of Potter, 188 Cal. 56[illegible]) These
9 decisions clearly establish that the tax here involved is not a charge upon the estate within the meaning of section 203 (a) (1) of the revenue act of 1916. (See also Stebbins v. Riley, 268 U. S. 137, 143, 144; New York Trust Company v. Eisner, 256 U. S. 345.)

4. Although the question of the deductibility of State inheritance taxes from gross estates for the purpose of the Federal estate tax is no longer of general importance, since the revenue act of 1918 and subsequent acts specifically forbid the deduction of "estate, succession, legacy or inheritance taxes," nevertheless the question whether such taxes are charges upon the estate or upon the beneficiary frequently arises in connection with the determination of the net income upon which income tax must be paid by an executor or administrator under the revenue acts of 1916, 1918, 1921, 1924, and 1926. (See United States v. Mitchell, 271 U. S. 9.) In so far as the California tax alone is concerned there is some doubt whether the inheritance tax act of 1917 and later California statutes have so altered the State law as to make the tax a charge upon the estate. (See estate of Watkinson, 191 Cal. 591, 595; Estate of Letchworth, 201 Cal. 1.) But if we are correct in contending that the decision of the Court of Claims was erroneous, the case constitutes an unfortunate precedent for disregarding the applicable decisions of the State courts as to the nature and effect of State statutes imposing transfer taxes, and is to that extent in conflict with Keith v. Johnson, supra.

10 5. The case presents the same question as to the California inheritance tax as is involved with respect to the Massachusetts inheritance tax in Leach v. Nichols (No. 468, October term, 1931), now pending on a writ of certiorari to the Circuit Court of Appeals for the First Circuit. The Court of Claims decided the present case on the authority of its earlier decision in Merrill v. United States (66 C. Cls. 136), which is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in the Leach case (50 F. (2d) 787).

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

FEBRUARY, 1932.

11 In Court of Claims of the United States

No. J–679

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND Howard Sutherland, Alien Property Custodian

vs.

THE UNITED STATES

I. *Petition and amended petitions*

On December 18, 1928, the original petition was filed in the name of Barnim Kombst, Gertrude Luckhardt, and Ilka Wichmann.

On November 9, 1931, after the rendition of the judgment, the plaintiff, by leave of court, filed their amended petition to conform to the amount of the judgment of the court.

On January 27, 1932, by leave of court, the plaintiffs were allowed to file an amended petition by making Howard Sutherland, Alien Property Custodian, a party plaintiff. Said second amended petition is as follows:

II. *Second amended petition*

Filed January 27, 1932

Come now the plaintiffs, by Clarence W. De Knight, their attorney in fact, and respectfully show to the court:

1. That Rosa von Zimmermann died in Pasadena, California, on or about April 25, 1917, leaving a will dated December 29, 1916, making certain bequests, and devising and bequeathing to her sisters, Klara Kombst, Gertrude Luckhardt, and Ilka Wichmann, all the rest and residue of her estate, real, personal or mixed, share and share alike, and in the event of the death of either of them, the
12 share of such decedent to go to the legal heirs of such decedent, and naming as executors Joseph Friedlander and Walter F. Haas, of San Francisco, California.

2. That on or about May 14, 1917, letters testamentary were duly issued to Joseph Friedlander and Walter F. Haas by the Superior Court of the State of California in and for the County of Los Angeles, and after they rendered their final account, they were discharged on or about October 26, 1922.

3. That Barnim Kombst is the husband and sole heir of Klara Kombst, who died in August, 1921, and that he is a citizen of Germany residing in Credfeld, Germany; that Gertrude Luckhardt is an heir of Rosa von Zimmermann, deceased, and is a citizen of Germany residing in Charlottenburg, Germany; and that Ilka Wichmann is an heir of said decedent and is a citizen of Germany residing in Gorlitz, Silesia, Germany.

4. That on or about April 18, 1918, the Alien Property Custodian under the authority of the trading with the enemy act, approved October 6, 1917, and the Executive orders issued in pursuance thereof, made demand upon Joseph Friedlander and Walter F. Haas as executors of the last will and testament of Rosa von Zimmermann to convey, transfer, assign, deliver, and pay to him every right title, and interest of the said Klara Kombst, Gertrude Luckhardt, and Ilka Wichmann, who were at that time alien enemies, in and to the estate of Rosa von Zimmermann.

5. That pursuant to the revenue act of September 8, 1916, said executors on or about April 19, 1918, filed in the office of the United States collector of internal revenue at Los Angeles, California, a Federal estate-tax return for the said Rosa von Zimmermann,
13 deceased, showing a net estate for the purpose of the Federal estate tax of $1,861,152.35, and a tax of $138,908.51.

6. That subsequent to the filing of said return the Commissioner of Internal Revenue, on or about August 10, 1918, upon a review and audit thereof, increased the net estate for the purpose of the Federal estate tax to $1,927,610.88, with a resultant additional tax liability of $5,981.27.

7. That on or about April 19, 1918, said executors paid to the United States collector of internal revenue at Los Angeles, California, the sum of $138,908.51, the tax disclosed by said return, and on or about September 10, 1918, said executors paid to said collector of internal revenue the sum of $5,981.27, as the additional tax determined and assessed by said Commissioner of Internal Revenue.

8. That on or about October 23, 1918, said executors paid to the proper officers of the State of California the sum of $261,811.42, as an inheritance tax an account of the estate of said decedent.

9. That neither the net estate returned by said executors, nor the net estate as finally determined by said commissioner, was computed by deducting from the gross estate of said decedent the sum of $261,811.42, or any part thereof, for inheritance taxes paid the State of California by said executors.

10. That on or about December 27, 1923, Barnim Kombst, Gertrude Luckhardt, and Ilka Wichmann filed claims for refund with the Commissioner of Internal Revenue, which claims were based on the contention that the gross estate was overhauled, and on or about January 31, 1924, the Alien Property Custodian filed a claim for refund with the Commissioner of Internal Revenue based on
14 the same contention; that on or about November 23, 1925, the Commissioner of Internal Revenue was advised on behalf of the Alien Property Custodian and heirs of Rosa von Zimmermann, deceased, that claim was made also on the ground that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax; that on or about January 7, 1926, the Alien Property Custodian filed a formal claim for refund with the Commissioner of Internal

Revenue based on the contention that the sum of $261,811.42 paid to the State of California for inheritance taxes should be deducted from the gross estate of said decedent in computing the net estate subject to the Federal estate tax.

11. That on or about July 11, 1928, said Commissioner of Internal Revenue rejected said claim, based on the contention that the sum of $261,811.42 paid to the State of California as inheritance tax should have been allowed as a deduction, by letter to the Alien Property Custodian as follows:

"The bureau has examined the claim filed by you on behalf of the above-named estate for refund of Federal estate tax paid under the provisions of the revenue act of 1916 as amended by the act of March 3, 1917. The question presented was whether the amount paid by the executor of the estate in satisfaction of the California inheritance tax is deductible from the decedent's gross estate in determining the net estate for tax.

"Section 203 of the revenue act of 1916 allows certain deductions to be made for the purpose of computing the value of the net estate for Federal estate-tax purposes. Among the deductions allowed are 'such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered.'

"The courts of the State of California have uniformly interpreted the inheritance tax as being imposed on the right of the beneficiary to succeed to the estate. The State inheritance tax is not imposed on the estate but constitutes a charge against the beneficiaries; therefore, it is not a proper deduction under section 203 of the revenue act of 1916. Accordingly, your claim for refund as herein referred to is rejected in its entirety."

12. That the action of the Commissioner of Internal Revenue in refusing to deduct from the gross estate of said decedent in computing the net estate for the purpose of the Federal estate tax the amount of inheritance tax paid to the State of California in the sum of $261,811.42, and in assessing and collecting the Federal estate tax upon the value of said net estate without allowing such deduction, and in rejecting the claim for refund as aforesaid, was erroneous and illegal, in that the revenue act of September 8, 1916, under which said estate was taxed, provides that the net estate of the decedent shall be determined by deduction from the gross estate, among other things, claims against the estate and such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered, and under the laws of California said inheritance tax paid by said executors was a charge against the estate and a claim against the estate within the meaning of the Federal revenue act of 1916.

13. That in arriving at the amount of the Federal estate tax due from said estate, said commissioner erroneously and illegally, and without authority of law, calculated said tax upon the

alleged taxable net estate of $1,927,610.88, resulting in the assessment and collection of a tax in the sum of $144,889.78; that said commissioner in acting upon said claim thereafter erroneously and illegally, and without authority of law, refused to deduct from the gross estate of said decedent in arriving at the net estate for the purpose of the Federal estate tax the amount paid to the State of California as inheritance tax aforesaid. The entire sum of $261,811.42 paid as inheritance tax to the State of California should have been deducted from the gross estate resulting in a taxable net estate of $1,665,799.46, which would have resulted in the assessment and collection of a tax of $121,421.95 instead of $144,889.78.

14. That $23,563.03 was unlawfully exacted and retained as aforesaid by defendant from plaintiffs and is withheld at the cost and expense of the plaintiffs.

15. That on or about September 29, 1922, the Alien Property Custodian filed a petition for distribution of the said estate with the Superior Court of the State of California in and for the County of Los Angeles, and on or about October 26, 1922, the said court entered an order distributing the said estate in accordance with the will of the said decedent, and after the payment of the debts and bequests to persons other than the plaintiffs herein, the residue of the estate devised and bequeathed to the plaintiffs under the will of said decedent was distributed to the Alien Proper Custodian.

16. That plaintiffs are the sole owners of the claim herein sued upon, and that no assignment or transfer of the claim or any part thereof or any interest therein has been made; that under and
17 by virtue of the laws of Germany, citizens of the United States are accorded the right to prosecute claims against Germany in its courts; that plaintiffs have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States; and that plaintiffs believe the facts as stated in this petition to be true.

Wherefore plaintiffs pray judgment against the defendant in the sum of $23,563.03 with interest at the rate of six per cent per annum on $17,581.76 from April 19, 1918, and on $5,981.27 from September 10, 1918.

BARNIM KOMBST,
GERTRUDE LUCKHARDT,
ILKA WICHMANN,
By CLARENCE W. DE KNIGHT,
Their Attorney in Fact.

Signed HOWARD SUTHERLAND,
Alien Property Custodian.

18 [*Duly sworn to by Clarence W. De Knight and Howard Sutherland; jurats omitted in printing.*]

19 III. *General traverse*

Filed Jan. 26, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Argument and submission of case*

On October 15 and 16, 1930, this case was argued and submitted on merits by Mr. Frederick Schwertner, for plaintiffs, and by Mr. Fred K. Dyar, for defendant.

20 V. *Special findings of fact, conclusion of law, and opinion of the court, by Whaley, J.*

Filed November 2, 1931

Mr. Frederick Schwertner for the plaintiffs. Mr. Clarence W. DeKnight was on the briefs.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Charles B. Rugg for the defendant. Mr. William T. Sabine, jr., was on the brief.

This is a suit to recover Federal estate taxes in the sum of $23,563.03, together with interest thereon, and the basis of the action is the refusal of the Commissioner of Internal Revenue to allow as a deduction from the gross estate in arriving at the net estate subject to tax the sum of $261,811.42 paid to the proper officers of the State of California as an inheritance tax under the laws of the said State. The decedent, Rosa von Zimmerman, died on April 25, 1917, and Federal estate taxes were paid under the revenue act of 1916, as amended.

This case having been heard by the Court of Claims, the court, upon the stipulation of facts entered into by the parties, makes the following

SPECIAL FINDINGS OF FACT

1. Rosa von Zimmermann, a resident of the United States, died in Pasadena, California, on or about April 25, 1917, leaving a will dated December 29, 1916, making certain bequests, and devising and bequeathing to her sisters, Klara Kombst, Gertrude Luckhardt, and Ilka Wichmann, all the rest and residue of her estate, real, personal,

or mixed, share and share alike, and in the event of the death of either of them, the share of such decedent to go to the legal heirs of such decedent, and naming as executors Joseph Friedlander and Walter F. Haas, citizens of the United States and residents of San Francisco, California. Rosa von Zimmermann at the time of her death was a German alien enemy.

2. On or about May 14, 1917, letters testamentary were duly issued to Joseph Friedlander and Walter F. Haas by the Superior Court of the State of California in and for the County of Los Angeles. They qualified and acted as executors of the said estate of Rosa von Zimmerman, deceased, and after the payment of debts and bequests to persons other than the plaintiffs herein, they rendered their final account to the said Court and were discharged on or about October 26, 1922.

21 3. Klara Kombst died in Germany on August 16, 1917, and at the time of her death was an alien enemy. She left surviving her as her sole heir, her husband, Barnim Kombst, who is a citizen of Germany, residing at Kassel, Germany, Kirchweg 84. Gertrude Luckhardt is an heir of Rosa von Zimmermann, deceased, and is a citizen of Germany residing at Berlin, Dahlem, Germany, Schorlemer, Allee 17a. Ilka Wichmann is an heir of said decedent and is a citizen of Germany residing at Gorlitz, Silesia, Germany. These parties were at all times during the World War alien enemies resident in Germany.

4. On June 12, 1918, the Alien Property Custodian under authority of the trading with the enemy act, approved October 6, 1917, and the Executive orders issued in pursuance thereof, served a notice and demand upon Joseph Friedlander and Walter A. Haas as executors of the said estate of Rosa von Zimmermann, deceased, to convey, transfer, assign, deliver and pay to him every right, title, and interest of the said Gertrude Luckhardt in and to the estate of Rosa von Zimmerman, deceased. A copy of the said notice and demand is attached to the stipulation marked "Exhibit A" and made a part hereof by reference. A similar notice and demand was served by the Alien Property Custodian on the said executors on June 12, 1918, covering the right, title, and interest of Ilka Wichmann and Klara Kombst in and to the said estate.

5. Pursuant to the revenue act of September 8, 1916, said executors on or about April 19, 1918, filed with the collector of internal revenue at Los Angeles, California, a Federal estate-tax return for the estate of Rosa von Zimmermann, deceased, showing a net estate for the purpose of the Federal estate tax of $1,861,152.35, and a tax of $138,908.51, which tax was paid by the said executors to the said collector on April 19, 1918.

6. Upon a review and audit of said return, the Commissioner of Internal Revenue increased the net estate to $1,927,610.88 and assessed an additional tax of $5,981.27, which ws paid by said executors to the said collector of internal revenue on September 10, 1918.

7. On October 23, 1918, said executors paid to the proper officers of the State of California the sum of $261,811.42 out of said estate as an inheritance tax under the laws of California on the estate of said decedent.

8. Neither the net estate returned by said executors nor the net estate as finally determined by the Commissioner of Internl Revenue was computed by deducting from the gross estate of said decedent the sum of $261,811.42, paid by said executors as inheritance taxes under the laws of the State of California.

9. On September 29, 1922, the Alien Property Custodian filed a petition for distribution of the said estate with the Superior Court of the State of California in and for the County of Los Angeles, and on October 26, 1922, the said court entered an order distributing the said estate in accordance with the will of the said decedent, and after the payment of debts and bequests to persons other than the plaintiffs herein, the residue of the estate devised and bequeathed to the plaintiffs was conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian.

10. On December 27, 1923, Barnim Kombst, Gertrude Luckhardt, and Ilka Wichmann filed claims for refund in the sum of
22 $25,000.00 each with the Commissioner of Internal Revenue, which claims were based on the contention that certain foreign securities and other property were overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim for refund in the sum of $75,000.00 with the said commissioner based on the same contention. On November 23, 1925, the said commissioner was advised by letter on behalf of the Alien Property Custodian and the plaintiffs herein that claim for refund was also made on the ground that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax. On January 7, 1926, a formal claim for refund was filed with the said commissioner based on the contention that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the gross estate of the said decedent in computing the net estate subject to the Federal estate tax. A copy of said claim for refund is attached to the stipulation marked "Exhibit B" and is made a part hereof by reference.

11. On July 11, 1928, said commissioner rejected said claim for refund as to the contention that the sum of $261,811.42 paid to the State of California as inheritance tax should have been allowed as a deduction, by letter as follows:

"The bureau has examined the claim filed by you on behalf of the above-named estate for refund of Federal estate tax paid under the provisions of the revenue act of 1916 as amended by the act of March 3, 1917. The question presented was whether the amount paid by the executor of the estate in satisfaction of the California inheritance tax is deductible from the decedent's gross estate in determining the net estate for tax.

"Section 203 of the revenue act of 1916 allows certain deductions to be made for the purpose of computing the value of the net estate for Federal estate-tax purposes. Among the deductions allowed are 'such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered.'

"The courts of the State of California have uniformly interpreted the inheritance tax as being imposed on the right of the beneficiary to succeed to the estate. The State inheritance tax is not imposed on the estate but constitutes a charge against the beneficiaries; therefore, it is not a proper deduction under section 203 of the revenue act of 1916. Accordingly, your claim for refund as herein referred to is rejected in its entirety."

12. Should it be determined that the said sum of $261,811.42 paid to the State of California as inheritance tax is a proper deduction from the gross estate of said decedent, Federal estate taxes were overpaid in the sum of $23,563.03.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of $23,563.03.

It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of twenty-three
23 thousand five hundred sixty-three dollars and three cents ($23,563.03), with interest at the rate of six per cent per annum on $17,581.76 from April 19, 1918, and on $5,981.27 from September 10, 1918, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of 1928, to be delivered to the Alien Property Custodian to be administered according to law.

OPINION

WHALEY, Judge, delivered the opinion of the court:

The facts in this case, which were stipulated, disclose that the property of the plaintiffs was seized, confiscated and impounded by the President of the United States, acting through the Alien Property Custodian, and at the present time the corpus of the legacies is still held by him and can not be returned to them until further legislative enactment by Congress. (Trading with the enemy act, Oct. 6, 1917, c. 106, 40 Stat. 411, amended March 28, 1918, c. 28, 40 Stat. 459, 460; Nov. 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977.)

What part, if any, has been returned to them, under the act of March, 1923 (42 Stat. 1511, c. 285), and the act of 1928 (45 Stat. 254, c. 167), the record does not disclose and is immaterial to the case

before us. The Alien Property Custodian took over all the right, title, and interest of these plaintiffs in 1918 and has ever since remained in control and possession.

The tax in question was paid in October, 1918, by the executors of the estate after notice to them by the custodian of the confiscation. Actual possession of the property by the Alien Property Custodian was had in 1922. Upon the notification to the executors by the custodian, under the terms of the act, he succeeded to all the rights in the property to which the alien enemies were entitled as completely as if by conveyance, transfer, or assignment. (Commercial Trust Co. v. Mille 262 U. S. 56; Central Trust Co. v. Garvan, 254 U. S. 554.) Th funds have been ever since, and are now, in the possession and co l, subject to the acts of Congress, of an agent of the defendant. The refund claim by the custodian was not filed until January 7, 1926, eight years after the payment of the tax, and more than four years after the declaration of peace on July 2, 1921. The Commissioner of Internal Revenue rejected the claim on July 11, 1928. It is contended by the defendant that under sec. 1316 of the revenue act of 1921, amending sec. 3228, Rev. Stat., all claims for refund of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive, must be presented to the commissioner within four years after payment of such tax or sum. If this limitation of four years applies, the claim which has been filed by the custodian can not afford the basis of any refund, since it was filed subsequent to the expiration of the four year period. Does the bar interposed by sec. 1316 apply to a refund claim filed by an agent of the Government? There can be no question the executors could not have filed a claim for refund in behalf of alien enemies. (Borovitz v. American Hard Rubber Co., 287 Fed. 368; Crawford et al. v. Wm. Penn, Fed. Cases, No. 3372, 6 Fed. Cases 779; Sierra v. United
24 States, 9 C. Cls. 224.) The plaintiffs, being alien enemies, could not file a claim during the period of the war, and since the declaration of peace in July, 1921, having no right to the corpus of the estate, could not file a claim for refund within the statutory period. (Stoehr v. Wallace, 255 U. S. 239.) It is unnecessary to decide whether the statute has ever begun to run against plaintiffs. If there is a refund allowed it must be paid to the custodian, who is now in control of the corpus. Does the statute of limitations apply to the custodian who holds the property of the plaintiffs, subject to the direction of the Congress? The custodian is the representative of the Government.

In United States v. Nashville & Ry. Co. (118 U. S. 120, 125) it is held: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States asserting rights vested

in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." (See also United States v. Whited & Wheless, 246 U. S. 552, 561.)

In DuPont De Nemours & Co. v. Davis, Director General of Railroad (264 U. S. 456, 462), the Supreme Court said: "In taking over and operating the railroad system of the country the United States did so in its sovereign capacity, as a war measure * * *. An action by the director general to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, * * * and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it."

It is manifest the bar of the provision of sec. 1316 of the act of 1921 does not apply to the Alien Property Custodian, and therefore the refund claim was timely.

The next question which confronts us is whether the inheritance tax paid to the State of California is a charge against the estate, or against those who succeed to the estate. A similar question has been before the Supreme Court on several occasions involving the construction of the inheritance-tax statutes of the State of New York (United States v. Mitchell, 271 U. S. 9), and of the State of Texas (Keith, Collector, v. Johnson, Administrator, 271 U. S. 1). This court has had a case involving the construction of the inheritance-tax statute of the State of Massachusetts (*Merrill* v. *United States*, 66 C. Cls. 136). In all of these cases it has been held that the tax is a charge against the estate, and therefore deductible in the estate-tax return made to the Federal Government. We have carefully compared the statute of the State of California with the statutes of the other States involved in those cases. We can find no substantial differences. The value of the estate was fixed as of the time of the death of the testator; the tax is due and payable at the death of the decedent; the executors are made responsible for the payment of the tax; it must be paid in eighteen months, otherwise bond has to be given by the executors; no payment can be made to any heir or legatee until a receipt has been filed in court showing the payment of the tax, and other provisions are almost identical with the
25 statutes of the States we have mentioned before. The decisions of the courts of California as to whether this is a transfer or a succession tax are somewhat clouded. In one case they determine it a transfer tax (Estate of Potter, 188 Cal. 55); in another a succession tax; and in a third, a transfer and succession tax (Estate of Letchworth, 201 Cal. 1); but all of the cases are uniform in holding that the amount of the tax is based on the value of the estate at the time of the death of the testator and that the impairment of the estate by the executors does not reduce the amount of the tax which must be paid on the gross value of the estate at the time of death. (Estate of Hite, 159 Cal. 392.) We can see no difference between this

statute and that held in the case of United States v. Mitchell (supra); the case of Keith, Collector, v. Johnson, Administrator (supra); and the case decided by this court, Merrill v. United States (supra). We are therefore of the opinion that the amount paid from the estate of Rosa von Zimmermann to the State of California was a charge against the estate and was deductible from the estate tax paid to the Federal Government, and the refund claim should have been allowed by the Commissioner of Internal Revenue.

It is so ordered.

WILLIAMS, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

26 *Exhibit A*

Original

A. P. C. Form No. 106–N. Demand on fiduciary. Report No. 16250

Alien Property Custodian

Trust No. C–15801

DEMAND BY ALIEN PROPERTY CUSTODIAN FOR PROPERTY

Extracts from trading with the enemy act:

SEC. 7. (c). "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

SEC. 7 (e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The Alien Property Custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the Alien Property Custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into

the possession of the Alien Property Custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

Extracts from Executive order dated February 26, 1918:

SEC. 1. (c). "The words 'right,' 'title,' 'interest,' 'estate,' 'power,' and 'authority of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power, and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy."

SEC. 2 (a). "A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

SEC. 2 (c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the trading with the enemy act and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

To JOSEPH FRIEDLANDER & WALTER F. HAAS,
As Executors of the Last Will & Testament of
Rosa Von Zimmerman, Deceased, % Joseph Friedlander,
Address, % Anglo-London-Paris National Bank,
San Francisco, Cal.

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the act of Congress known as the trading with the enemy act, approved October 6, 1917, and the Executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act and said Executive orders, after investigation do determine that:

Gertrude Luckhardt, whose address is 124 Schiller St., Charlot-
(Name of enemy or ally of enemy) (Last known address)
tenburg, Germany, is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to the estate of Rosa Von Zimmerman, deceased.
(To be here properly described)

I, as Alien Property Custodian, hereby require that every right, title, and interest of said enemy in and to the estate above described, including every power and authority thereover, shall be by you conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, and that any money or property now or hereafter held by you which the enemy may at any time or times, now or hereafter, be entitled to receive either upon or without demand, shall at such time or times be conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian.

I, as Alien Property Custodian, hereby further require that you shall give to me, as Alien Property Custodian, every notice in respect to the said estate to which the said enemy may be entitled.

The Anglo-London-Paris Nat'l. Bank is hereby designated as depositary, and is authorized to receive, for and on behalf of the Alien Property Custodian, the property herein mentioned, and upon the service of this demand on you by said depositary, you are directed to deliver the said property to it forthwith. For money demanded, checks may be delivered to the depositary, which in all cases should be made payable to the Alien Property Custodian.

Witness my hand and seal of office this 18th day of April, 1918.

A. MITCHELL PALMER,
Alien Property Custodian,
By J. L. DAVIS,
Managing Director.
J. R. Z.

27 *Exhibit B*

(Execute separate form for each tax period)

(Treasury Department, Internal Revenue Service. Form 843—Jan., 1922
Comptroller General U. S. January 18, 1922)

IMPORTANT.—File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in

CLAIM FOR

☐ ABATEMENT OF TAX ASSESSED
☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
☒ REFUND OF TAXES ILLEGALLY COLLECTED
☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR.—Collector must indicate in block above the kind of claim, except in income-tax cases.

COLLECTOR'S NOTATION.—District: ———. Account number: ——.
Date received (stamp here):
——— ———, *Collector of Internal Revenue.*

Date received by Administrative Unit (stamp here):

DISTRICT OF COLUMBIA, *ss:*

Alien Property Custodian (Estate of Rosa von Zimmerman),
(Name of taxpayer or purchaser of stamps)

Vermont Avenue and H Streets NW.,
(Residence—give street and number as well as city or town and State)

Washington, D. C.
(Business Address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From:----------	19---.
To:----------	19---

1. Business in which engaged: Alien Property Custodian.
2. Character of assesssment or tax: Federal estate tax.
(State for or upon what the tax was assessed or the stamps affixed)
3. Amount of assessment or stamps purchased---------- $144,889.78
4. Reduction of tax liability requested (income and profits tax)-- $----------
5. Amount to be abated---------- $----------
6. Amount to be refunded (or such greater amount as is legally refundable)---------- $23,563.06
7. Dates of payment (see collector's receipts or indorsements of canceled checks: $138,908.51 on April 19, 1918; $5,981.27 on September 10, 1918.
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed: Los Angeles, Calif.
9. District in which unpaid assessment appears:----------
10. Amount of overpayment claimed as credit---------- $----------
11. Unpaid assessment against which credit is asked:
Period from----------to---------- $----------

Deponent verily believes that this application should be allowed for the following reasons:

Rosa von Zimmerman died in Los Angeles, Calif., on April 25, 1917, and there was paid to the collector of internal revenue at Los Angeles, Calif., as Federal estate tax, the sum of $144,889.78. In filing the Federal estate-tax return, the executors failed to take as a deduction the sum $261,811.42, which was paid to John N. Hunt, Los Angeles Co., treasurer, representing the California inheritance tax. This sum was paid out of the estate, and under the revenue act of 1916, as amended by the 1917 act, constituted a "claim" or "charge" against the estate.

Oral hearing before the Solicitor of Internal Revenue is respectfully requested.

(Attach additional sheets if necessary)

(Signed) CLARENCE W. DE KNIGHT,
Attorney for Alien Property Custodian
in re Estate of Rosa von Zimmerman.

Power of attorney is on file.

Sworn to and subscribed before me this 7th day of Jan., 1926.
[SEAL.] CAESAR A. CARBALLO,
Notary Public, D. C.

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge)

28 VI. *Order of court of January 27, 1932, vacating judgment entered November 2, 1931 (findings and opinion to stand), allowing filing of second amended petition and entering new judgment*

It is ordered this 27th day of January, 1932, on the court's own motion that the judgment entered in this cause November 2, 1931, be, and the same is, vacated and set aside, the findings of fact and opinion to stand.

It is further ordered that the plaintiff motion filed January 26, 1932, asking leave to file a second amended petition naming Howard Sutherland, Alien Property Custodian, a party plantiff be, and the same is, allowed; and

It is further ordered that judgment be, and the same is this day, entered in favor of the plaintiffs, Barnim Kombst, Gertrude Luckhardt, Ilka Wichmann, and Howard Sutherland, Alien Property Custodian, in the sum of twenty-three thounsand five hundred sixty-three dollars and three cents ($23,563.03), with interest at the rate of six per cent per annum on $17,581.76 from April 19, 1918, and on $5,981.27 from September 10, 1918, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of 1928.

29 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 36518. Cour of Claims. Term No. 704. The United States, petitioner, *vs.* Barnim Kombst, Gertrude Luckhardt, Ilka Wichmann, et al. Filed February 13, 1932. File No. 36518.

U. S. GOVERNMENT PRINTING OFFICE: 1932

Supreme Court of the United States

Order allowing certiorari

Filed March 21, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.